IN THE

Supreme Court of the United States

October Term, 1979

No. 79-346

WALTER F. KERRIGAN,

Petitioner,

vs.

FAIR EMPLOYMENT PRACTICE COMMISSION OF THE STATE OF CALIFORNIA and CITY OF SAN DIEGO, CITY ATTORNEY'S OFFICE,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of California

PETITION FOR WRIT OF CERTIORARI

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1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

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Petitioner Walter F. Kerrigan respectfully prays that a writ of certiorari issue to review the order of the Supreme Court of the State of California entered in this proceeding on June 7, 1979, denying petitioner's petition for hearing, thereby denying petitioner of an equal employment opportunity by a city.

OPINIONS BELOW

The order of the California Supreme Court denying a hearing on petitioner's petition, a copy of which is set forth as Appendix A to this Petition. The opinion of the California Court of Appeals, Fourth Appellate District, Division One, a copy of which is set forth as Appendix B, is reported as WALTER F. KERRIGAN v. FAIR EMPLOYMENT PRACTICE COMMISSION, Defendant and Respondent; CITY OF SAN DIEGO, Real Party in Interest and Respondent, 91 Cal.App.3d 43 (1979).

JURISDICTION

The order of the California Supreme Court that was entered on June 7, 1979. The present Petition for Writ of Certiorari is being filed within 90 days of the order.

Petitioner invokes the jurisdiction of this Court under Title 28, United States Code, section 1257(3), such rights have been especially set up and claimed under the Constitution of the United States.

QUESTIONS PRESENTED

1. Does a city subject to the provision of the California Equal Employment Act, have the legitimate power to deny a citizen of the equal employment provisions of the act and not be guilty of a violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution?

2. Does a city have the absolute right to deny an employment opportunity to a citizen because he moved to California from another state, and not be guilty of the violation of the privileges and immunities clause of Article Four of the United States Constitution?

3. Does a city have the absolute immunity to violate the equal protection clause of the Fourteenth Amendment and the right to petition clause of the First Amendment of the United States Constitution by retaliating against a citizen for filing complaint of unlawful employment discrimination with the Fair Employment Practice Commission Of The State Of California?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

United States Constitution, Article IV, Section 2, clause 2:

> "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several states."

United States Constitution, First Amendment:

> "Congress shall make no law prohibiting the . . . right of the people . . . to petition the government for a redress of grievances."

United States Constitution, Article VI, clause 2:

> "The Constitution, and the laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

California Constitution, Article I, Section 7, subdivision (a):

> "A person may not be deprived of life, liberty or property without due process of law or denied equal protection of laws."

California Constitution, Article III, Section 1:

> "The State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land."

STATEMENT OF THE CASE

I

CALIFORNIA DISCRIMINATION LAWS INVOLVED

1. Labor Code 1411 states the public policy of California:

> "1411. It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgement on accoun of . . . age.
>
> It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment for such reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interests of employees, employers, and the public in general.
>
> This part shall be deemed an exercise of the police power of the state for the protectin of the public welfare, prosperity, health, and peace of the people of the State of California.

2. Labor Code 1412 states age discrimination is a civil right:

> "1412. The opportunity to seek, obtain and hold employment without discrimination because of . . . age is hereby recognized as and declared to be a civil right."

3. Labor Code 1413(d) cities subject to act:

> "1413. As used in this part:
>
> (d) 'Employer,' except as hereinafter provided, includes . . . ; the state or any political or civil subdivision thereof and cities."

4. Labor Code 1420.1(a) unlawful to discriminate on basis of age:

> "1420.1. (a) It is an unlawful employment practice for an employer to refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote, any individual between the ages of 40 and 64 solely on the ground of age, except in cases where the law compels or provides for such action. This section shall not be construed to make unlawful the rejection or termination of employment where the individual applicant or employee failed to meet bona fide requirements for the job or position sought or held, or to affect bona fide retirement or pension programs; nor shall this section preclude such physical and medical examinations of applicants and employees as an employer may make or have made to determine fitness for the job or position sought or held.
>
> Promotions within the existing staff, hiring or promotion on the basis of experience and training, rehiring on the basis of seniority and prior service with the employer, or hiring under an established recruiting program from high schools, colleges, universities, and trade schools shall not, in and of themselves, constitute a violation of this section.
>
> (b) This section shall not limit the right of an employer, employment agency, or labor union to select or refer the better qualified person from among all applicants for a job. The burden of proving a violation of this section shall be upon the person or persons claiming that the violation occurred."

5. Labor Code 1420(e) prohibits reprisal and retaliation:

> "1420(e) provides it is a violation:
> For any employer . . . to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this act or because he has filed a complaint, testified or assisted in any proceeding under this part."

California has had an age discrimination law since 1961. *Curry v. Continental Airlines,* 513 F.2d 691 (9th Cir. 1975). Jurisdiction transferred by Legislature March 7, 1973, to FEPC so that the law would be enforced and California became a deferral state, as age discrimination is recognized by Congress to be a national problem and deferral is to give a citizen additional protection, if a state wants to enforce the law.

II

HISTORY OF THE CASE

Petitioner, Walter F. Kerrigan, age 55 (Adm. Tr. p. 11), moved to California from New York before he established the six months residence to be admitted to the New York bar on motion required based on his practice in Indiana and Illinois (Adm. Tr. p. 23).

After he was admitted to the California bar (Adm. Tr. p. 24) he inquired about employment at Respondent's office on August 8, 1973, and was informed by the receptionist that there were several openings, but he would have to file a resume, and was given an employment notice advertisement with information about the position and office and age statistics and day, year, and months of every member of the staff (Adm. Tr. p. 7, Exh. 7).

Petitioner delivered his resume (Adm. Tr. Exh. 8) and on August 24, 1979, appeared at the office and the receptionist gave him an updated job advertisement notice (Adm. Tr. Exh. 9). He talked to Deputy Shaffran until the chief deputy returned (Adm. Tr. p. 32). At the interview he was advised by the person in charge of hiring attorneys for Respondent, Chief Deputy Swett that the Respondent had hired a retired navy officer years ago in his age bracket, but that was the exception (Adm. Tr. p. 33, Exh. 1).

On September 15, 1973, Petitioner received a letter from Mr. Swett on Petitioner's stationery advising him that he had not been hired but stated in part ". . . We want you to know, however, that we are very highly impressed with your qualification. We shall keep your resume in our active file and in the event an unforseen opening on our staff occurs, your name will be among those seriously considered for employment." (Adm. Tr. Exh. p. 10; Appendix B, p. 5.)

Petitioner filed a verified complaint dated September 20, 1973, with the Fair Employment Practice Commission of the State of California, hereinafter referred to as the FEPC, based on the two notices showing an age preference, the fact that he was advised that years ago they had hired a retired navy offficer in his age bracket which was an exception, and the letter informing him that he was well qualified (Adm. Tr. 1).

FEPC Commissioner Diers and the FEPC consultant, Mr. Aranita, investigated the complaint. After the investigation, Commissioner Diers filed an accusation against Respondent charging a violation of the age discrimination act, Labor Code 1420.1(a) (Adm. Tr. Exh. 1).

On November 18, 1975, a hearing was held and the FEPC was represented by its associate counsel, Ms. Stopol, before three FEPC commissioners and an administrative law judge of the Office of Administrative Hearings.

The judge disclosed for the record that he went to law school with Mr. Swett and were acquainted and had fair employment practice hearings in the past (Adm. Tr. pp. 4, 5), but made no mention that he was a member of the City Attorneys of Southern California[1]/.

After the hearing a Commissioner completed her term of office so that none of the commissioners who heard the case decided the case. Two of the new commissioners adopted the decision drafted by the judge and the third commissioner abstained (Cl. Tr. pp. 45-50).

The decision found no violation of Labor code 1420.1(a), and violated both its own rules, Rules and Regulations Governing Practice and Procedure Before the Fair Employment Practice Commission, Section 307(d) and Labor Code, section 1426 as its decision gave no notice of review:

> "307(d) *Notice of Right to Review.* Any order issued by the commission shall have printed on its face references to Section 11523 of the Administrative Procedure Act which prescribe the rights of judicial review of any party to the

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1/ *The Administrative Law Bulletin* of California Office of Administrative Hearings 1973, Volume 2, January-December 1973, pages 4, 5, and 6 also disclosed that he was a City Attorney, Deputy City Attorney, and Assistant City Attorney with 11 cities from 1966 to 1971.

proceeding to whose position the order is adverse."

"1426. Any order issued by the commission shall have printed on its face references to the provisions of the Administrative Procedure Act which prescribe the rights of appeal of any party to the proceeding to whose position the order is adverse."

Petitioner filed a petition for writ of mandate with the Superior Court and not only objected to the finding of no violation of Labor Code 1420.1(a) but the fact that there was a violation of Labor Code 1420(e), as it was adduced at the hearing that Respondent refused to consider Petitioner for two additional openings, so there was an additional violation.

Petitioner requested the trial court to make a full independent judicial review (Cl. Tr. 14). The trial court had the duty in "independent judgment" cases to make its own determination and findings of material facts. *Whitlow v. Board of Medical Examiners,* 248 Cal.App.2d 478; 56 Cal.Rptr. 525, 530 (1967), but the trial court made no findings (Decision, Appendix B, p. 14).

The decision on the key issue (Appendix B, p. 14) found no discrimination claiming that Petitioner simply failed to meet, to carry the burden of proof.

There was a total lack of reasoning, analysis, or discussion of the burden of proof or disproof. Did not consider the prima facia case and burden of proof standards laid down by this court in *McDonnell-Douglas.* And the decision did not mention a

case on age discrimination, or any one of the numerous federal cases involving employment discrimination cited in Petitioners points and authorities with the exception of *Northern Inyo Hospital v. Fair Employment Practices Commission,* 38 Cal.App.3d 1425; 112 Cal.Rptr. 872 (1974), a case not cited for its findings of discrimination and retaliation but only for the fact that equal employment opportunity is a fundamental vested right.

The decision focused on fundamental vested rights and decided where constitutional rights are involved, the courts are better equipped to perceive and defend those rights than are administrative agencies.

The decision ruled (Appendix B, p. 14) that there was no retaliation as Petitioner did not make that charge in his complaint. Retaliation was another key issue, and the decision did not mention the fact that the Petitioner could not include the retaliation violation in his complaint as the retaliation was the result of the complaint, and Petitioner did not learn about the retaliation until the hearing.

The Appellate Court denied a petition for rehearing.

The California Supreme Court denied a hearing.

III

FACTS AND PROOFS

A.

PRIMA FACIE CASE ESTABLISHED

1. THE EMPLOYMENT NOTICES THEMSELVES CONSTITUTE THE PROOF OF AGE DISCRIMINATION.

The burden of proof is on the Petitioner as set forth in the cases discussed and the statute, Labor Code 1420.1(b) that states:

> "(b) . . . The burden of proving a violation . . . shall be upon the person . . . claiming that the violation occurred."

The easiest method of proof is by direct proof furnished by the employer.

Direct evidence of age discrimination are the Respondent's job information notice advertisings (Adm. Tr. Exh. 7, 9, 16).

29 U.S.C. § 623(e) prohibits the printing or publishing any notice or advertising indicating any preference, limitation, specification, or discrimination against those in the protected age group.

When Petitioner inquired about employment with Respondent, it gave him a job notice advertising for 1972 that listed the employees in the civil and criminal department and their month, day and year of birth (Adm. Tr. Exh. 7) and also the following statistics:

OFFICE OF SAN DIEGO CITY ATTORNEY
PERSONNEL STATISTICS
PROFESSIONAL STAFF
1973

AGES:

MEDIANS:

OFFICE	*CIVIL DIVISION*	*CRIMINAL DIVISION*
31	32	29

MEANS:

OFFICE	*CIVIL DIVISION*	*CRIMINAL DIVISION*
32	35	30

When Petitioner came into Respondent's office for his interview he received the 1973 notice (Adm. Tr. Exh. 9).

At the hearing on November 18, 1975, a 1974 notice Petitioner received, was introduced (Adm. Tr. Exh. 16). And the Respondent's witness testified that there is a 1975 edition of it (Adm. Tr. 140). So Respondent was also violating the Federal Act.

In *Hodgson v. First Federal Savings & Loan Association,* 455 F.2d 818 (5th Cir. 1972) a newspaper advertisement for a "young man" was considered substantial evidence of a policy of age discrimination.

An employment agency was found to have violated the age discrimination act by placing "help-wanted" advertisements in newspapers indicating a preference for a "girl." The court decided that the Labor Department's interpretations were entitled to "great deference," and the court found that the ads indicated a prejudice against individuals over 40. *Hodgson v. Career Counsellors Int'l, Inc.,* 5 FEP Cases 129 (N.D.Ill. 1972).

A manufacturer ran a newspaper ad that read "looking for a bright young girl with a pleasant phone voice" was found to have violated the age discrimination act in *Hodgson v. Western Textile Co.*, 7 CCH 9383 (N.D.Ill. 1974).

2. PRIMA FACIE CASE ALSO ESTABLISHED BY CRITERIA OF *MCDONNEL-DOUGLAS*

Direct evidence of discrimination in a discriminatory job advertisement case is not the only way to prove a prima facie case. Many cases, unlike the case at bar, do not have evidence of direct proof.

The California Supreme Court in *Bakke v. Regents of University of California,* 553 P.2d 1152, 1172 (1976) by analogy to a substantial number of federal cases involving employment discrimination as it stated:

"*Bakke's Appeal*

> [18] As set forth above, the trial court found that Bakke would not have been admitted to either the 1973 or 1974 entering class at the University even if there had been no special admission program. However, in reaching this conclusion the court ruled that the burden of proof remained with Bakke throughout the trial. He asserts that since he established that the University had discriminated against him because of his race, the burden of proof shifted to the University to demonstrate that he would not have been admitted even without the special admission program.

> We agree. Under the general rule, the burden of proof would remain with plaintiff Bakke throughout the trial on the issue of his admission. (Evid.Code, § 500.) However, a substantial number of federal cases involving employment discrimination under title VII have held that if the plaintiff establishes that the employer has been guilty of discrimination in hiring or promotion, and he brings himself within the class of employees who suffered discrimination, the burden of showing that he was unqualified for the job or the promotion rests with the employer. (See, e. g., *Franks v. Bowman Transportation, Inc.*, supra, 96 S.Ct. 1251; *Mims v. Wilson* (5th Cir. 1975) 514 F.2d 106, 110; *Meadows v. Ford Motor Company* (6th Cir. 1975) 510 F.2d 939, 948; *Baxter v. Savannah Sugar Refining Corporation* (5th Cir. 1974) 495 F.2d 437, 444-445.) As the United States Supreme Court stated in the *Franks* case, 'no reason appears . . . why the victim rather than the perpetrator of the illegal act should bear the burden of proof. . . .' (96 S.Ct. at p. 1268.)"

This court for the burden of proof in individual discrimination cases relies on *McDonnel Douglas Corp. v. Green*, 411 U.S. 792 (1973) that provides guidance and a working formula for proof or disproof in a disparate treatment case of individual refusal to hire as discussed in the recent case of *Furnco Construction Corporation v. Waters,* 98 S.Ct. 2943 (1978).

The complainant under *McDonnel* must establish a prima facie case by a four step formula. Must be in protected age group, applied for position, qualified for position, employer seeking applicants when he applied, despite his qualification he or she was qualified, and the employer continued to search for applicants from applicants qualifications.

The *McDonnell* case divided the burden of proof allocation into three stages: (1) complainant's burden of making a prima facie cause by the above four step formula, (2) the employer must articulate some legitimate nondiscriminatory reason for rejection of employment, and (3) if the employer has given a legal nondiscriminatory reason, it is the complainant's burden to show it was a sham to cover the real discriminatory motivation.

In a suit brought by a private individual, *Wilson v. Sealtest Foods Division of Kraft Co. Corp.*, 501 F.2d 84 (5th Cir. 1974) upheld the Department of Labor's position that a prima facie case of age discrimination is established by the criteria set forth by this court in *McDonnel Douglas Corp. v. Green, supra* 802 are met.

The decision (Appendix B) disclosed Petition met the criteria formulated by this court in *McDonnell*:

(i.) Petitioner is age 55 (Decision p. 4) and protected age group is 40 to 64 (p. 6);

(ii) Petitioner applied for the position (p. 6); that he was qualified for the position (p. 3) [Respondent admitted he was qualified] (Adm. Tr. pp. 156-157); and the Respondent was seeking applicants when he applied (p. 5) ["we were desperately short of deputies at that time] (Adm. Tr. p. 113);

(iii) that despite his qualifications he was rejected;

(iv) the Respondent continued to search for applicants from persons of Petitioner qualifications after rejection of his application. [Respondent advised the FEPC consultant that Respondent had two additional openings but would not

consider Petitioner as he filed a complaint with the FEPC (p. 5)].

Postorff v. Fletcher, 46 L.W. 2523 (N.D. Ala. March 10, 1978), a 62 year old worker had been replaced with a 42 year old for reasons of age. The 62 year old was qualified; after he was fired the employer sought someone of his qualifications - the 42 year old to take the job. The court decided the blueprint of *McDonnell-Douglas* is satisfied and the employer was guilty of age discrimination.

3. HIRING PRACTICES DISCRIMINATORY

The job notices were sent to only a few selected law schools. This policy excluded most persons in the protected age group.

Swett said after the complaint he had some second thoughts about broadening the recruiting to include law schools that had a higher number of persons over 40 (Adm. Tr. p. 77).

Also as a result of the Complaint the recruiting efforts added advertisements in local legal newspapers to get the word out to people (Adm. Tr. p. 157).

Walk-in applications were handed differently. These would be persons who were not in the favored law schools and could be in the over 40 age group. If they had experience they would not get the job, as it was concluded if they had experience they probably wouldn't take the job (Adm. Tr. p. 96).

Respondent had the hiring policy before and after the complaint not to hire anyone over 40 unless they were retired military, with one exception a blood relative (Adm. Tr. pp. 88, 91).

29 C.F.R. § 860.91 states that an employer will have violated the Act, in situations where it applies, when one individual within the age bracket is given job preference.

And 20 C.F.R. § 860.104(a)(1) "It is considered discriminatory for an employer to specify that he will hire only persons receiving old age Social Security insurance benefits. Such a specification would result in discrimination against other individuals within the age group willing to work under the wages and other conditions of employment involved, even though those wages and conditions may be peculiarly attractive to Social Security recipients. . . ."

B.

RESPONDENT DID NOT GIVE A LEGAL NONDISCRIMINATORY REASON FOR NOT HIRING PETITIONER

The California Attorney General in his answer to Petitioner's Brief for Rehearing on page 3, listed four "valid nondiscriminatory reasons" advanced by Respondent for not hiring Petitioner.

The first four "reasons" are the ones listed by the Attorney General and the next seven are from the evidence.

"1. Appellant has been unable to find a job in his area of experience. (R.T. 115, 123.)"

The Respondent's requirement that the Petitioner must have been able to find a job in the San Diego area in his area of experience violated the equal protection clause of both the federal and state constitutions.

The Fourteenth Amendment embodied the general policy that all persons shall abide in any state on an equality of legal privileges with all citizens.

There was no evidence that Respondent's two witnesses or any other persons was required to find a job in San Diego before they could be considered for government service.

Edwards v. California, 314 U.S. 160 (1941) decided that California could not require a person to have wealth before he could come to California, as the right to move freely from State to State is an incident of national citizenship protected by the privileges and immunity clause of the Fourteenth Amendment.

Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) held that San Francisco's discriminatory application of a facially neutral building regulation to eliminate its Chinese residents from the laundry business, but permitting other persons to operate in wooden buildings was illegal:

> "For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

Takahashi v. Fish And Game Commission, 334 U.S. 410 (1948) outlawing California law that denied a California resident if Japanese from obtaining a commercial fishing license.

"2. Other applicants appeared to be more interested in municipal law."

There was not a shred of evidence to support this "reason" but only an excuse for the intent to discriminate, as disclosed on questioning by a Commissioner (Adm. Tr. 156).

> Witness ". . . I felt that other persons I had talked to were more interested in performing the work as a criminal division deputy city attorney." (Adm. Tr. 156.)
>
> Commissioner "His conversation with you, though, did not set forth that reason. That is your assumption is that correct?"
>
> Witness: "I don't understand."
>
> Commissioner: "He came to you to apply for the position. He didn't say it is the only thing he can get, so he'll apply."
>
> Witness: "No, he didn't say that, but of course in my conversation with him, it was -- it was my judgment that this was a fact and I took it into consideration."

"3. Appellant appeared to have had little experience in the kind of work he would be required to do (R.T. 138)."

Under questioning, Respondent's witness testified "I might say I did not consider him unqualified for the position." (Adm. Tr. p. 156.)

Respondent did not like Petitioners background claiming no carry over from civil litigation to criminal type of litigation

(Adm. Tr. p. 124). However, a newspaper article said Respondent was using a federal grant of funds to develop a more sophisticated approach towards leveling charges in its consumer complaints thorugh the mechanism of civil law.[2]/

And Respondent's witness testified that he was late because he was attending a press conference to announce the filing of the first consumer protection lawsuit by the consumer protection unit, "a rather large, *civil* (emphasis added) consumer protection law suit." (Adm. Tr. p. 136.)

"4. Appellant's demeanor during his interviews was a negative factor." (R.T. 124, 156)

Respondent did not like his demeanor based on the illegal discriminatory reasons advanced above as items 1, 2, and 3.

5. ". . . He did not appear to me to be a person that I would want down in the courts as a prosecutor, attempting for instance, as he would be doing in the early stages, trying a traffic ticket in front of a jury." (Adm. Tr. p. 117)

The California Supreme Court had admitted Petitioner to practice law only a month or two before his talk with the witness. This indicated that the Petitioner was qualified to apply to be admitted to the California Bar, that he had been actively and substantially engaged in the practice of law in Illinois and Indiana, that his experience had qualified him to take the Bar examination, and that he had passed the Bar examination.

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[2]/ *The San Diego Union,* December 17, 1976, page 1.

The California Supreme Court authorized Petitioner to practice law in every state court in California, but an employee of a state municipality decided after a short talk with Petitioner that Petitioner was not qualified to handle a traffic ticket in the traffic division of the San Diego Municipal Court (Adm. Tr. 117).

The Respondent's witness had not made a subjective evaluation, but disclosed a discriminatory purpose had been a motivating factor in the government's decision, and it was not a legitimate government decision.

6. ". . . and I naturally got a negative impression from somebody who appeared to be more interested in a different field of law." (Adm. Tr. 123)

The witness made the statement when he represented the Respondent in public utility matters before the Public Service Commission in the civil division. And when asked if he would like to go back and be a trial deputy and he answered, "I don't think I really like to go back (Adm. Tr. p. 119). Witness could be interested in a different field of law, but not Petitioner.

The reason was not a legitimate governmental decision as the job notice indicated there was not only a criminal division but a civil division. The Respondent's attorneys handle public utility matters, injuries, real estate, and other matters that required attorneys who were interested in different fields of law.

7. Deputy Sheffran testified that on the same day of the interview he recommended to Chief Deputy Swett that Petitioner not be hired (Adm. Tr. pp. 116, 117).

The evidence discloses that the testimony of Mr. Shaffran was sheer afterthought two years later at the hearing based on the following facts.

(1) Two weeks after the interview, Petitioner received the I want you to know we are very highly impressed with your qualification and keep you on file letter (Appendix B, p. 5). Petitioner not informed about Mr. Shaffran's recommendations.

(2) The FEPC consultant telephoned Mr. Swett and visited him in his office and made a report to the Commissioner and made notes that Respondent's attorney received, but no communication mentioned Mr. Shaffran. (Adm. Tr. pp. 57, 62, 95).

(3) Mr. Swett had a telephone conversation with Commissioner Diers and no testimony he knew about Mr. Shaffran (Adm. Tr. p. 59).

(4) Mr. Swett sent Commissioner Diers a letter, no mention of Mr. Shaffran (Adm. Tr. Exh. 13).

(5) Mr. Shaffran testified he couldn't remember if he did or didn't have lunch with Petitioner on the day of the interview (Adm. Tr. p. 116).

(6) Mr. Shaffran under questioning from Commissioner Sandoval admitted that rather than interview, he talked to people. "I don't think more than five over a year." (Adm. Tr. p. 126)

(7) Mr. Swett testified "Nobody else in the office interviews anybody for employment if I'm unavailable for some reason." (Adm. Tr. p. 135)

(8) Mr. Swett did not testify that he had been advised by Mr. Shaffran not to employ Petitioner.

8. "Shaffran suspected Kerrigan may have come to San Diego to retire. . . ." (Opinion, Appendix B, p. 4)

FEPC Consultant testified that he was told by Mr. Swett that Petitioner had come from out of state and it was Mr. Swett's opinion that Petitioner had come to San Diego to retire because of the good climate (Adm. Tr. 62).

Mr. Shaffran testified that he had retired before being employed by Respondent (Adm. Tr. p. 111).

Respondent's policy of only hiring those persons over 40 who had retired from the military and refusing to hire Petitioner because of the excuse that Petitioner might have come into California to retire is a direct violation of the Privileges and Immunities Clause of the United States Constitution.

Petitioner moved to California, a resident of Illinois, from his home in New York before he established the six months residence required by New York to be admitted to the New York bar on motion (Adm. Tr. p. 42).

The "Alaska Hire" case of *Hicklin v. Orbeck*, 98 S.Ct. 2482, 2487 (1978) quoted *Paul v. Virginia*, 8 Wall. 168, 180, 19 L.Ed. 357 (1868) that stated the purpose of the privileges and immunities clause is to place citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States and it secures to them in other States the equal protection of their laws.

9. Respondent's reason for its policy of only hiring persons over 40 with the one except of a brother of a former employee who were retired military is based on the statement of the Administrative Law Judge, "That this (San Diego) is an area with an awful lot of retired service personnel." (Adm. Tr. p. 103)

This is not a legitimate non-discriminatory reason for the following reasons:

(1) San Diego has the second largest population in California. The County's population is 1,790,000.[3]/

(2) Mr. Fitch, a retired navy officer applied for employment in 1966, out of state (Adm. Rec. p. 137, Exh. 14).

(3) Respondent's employees traveled to Los Angeles, San Francisco, and Sacramento to interview prospective employees (Adm. Tr. p. 141).

(4) Mr. Shaffran was interviewed in San Francisco (Adm. Tr. p. 111).

(5) Mr. Shaffran testified that there were 450 students in his class at law school and in his section of 100 probably 10 of them over 40 (Adm. Tr. p. 122).

10. That Swett considered Petitioner less qualified than the persons he hired. (Opinion, Appendix B, p. 5) The first five hired had been working in the office as interns after he interviewed at least 30 applicants and were from 27 to 31 years.

The federal guidelines advises employers that one must be cautioned about the words "*best qualified*" because of what

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[3]/ *San Diego Daily Transcript*, August 5, 1979, p. 1.

federal law describes as "false business necessity" and examples of these discriminatory explanations are found in Title VII, Civil Rights Act of 1964 are:

1. Savings to be gained in shorter time necessary for training employees on new jobs.

2. Preserving or bettering a company's image.

3. Customer or co-worker preference.

4. Superior or inferior ability to perform *non-essential aspects of a job*; or

5. Need to maintain harmony or decorum at a place of business.

Lack of certain skills which only the five interns possess and the 30 other applicants did not possess only because the five selected had the skills or abilities only through on-the-job training should not have been a hiring issue. The twenty five other applicants are being treated differently, in that the five others were given training to gain the qualificatins necessary for the job. The differential application of standards. In evaluating the application of protected class members, the employer should consider the applicants' ability to be trained for the job.

In *Coates v. National Cash Register Co.*, 443 F.Supp. 655 (D.W.Va. 1977), Coates was age 50 and Smith age 40 were field engineers. The branch manager was directed to retain on the payroll only those engineers who could service both mechanical and electronic equipment. Coates and Smith were dropped because they were the only engineers that lacked electronic machine training. The court decided their discharge was directly

related to their age, because the company had trained mainly young men for electronic work, since older engineers were too valuable to be spared for the time necessary to undertake the training course. The remedy prescribed by the court included an accelerated training schedule so that Coates and Smith would reach a level of competence competitive with that of younger engineers.

Respondent's attorney asked Petitioner, "Did you ever prosecute a felony matter?" (Adm. Tr. p. 40) However, the Administrative Law Judge finally stated, "I'll take official notice and instruct the commission that cities in this are precluded from prosecuting felonies; that those are solely within the province of the district attorney." (Adm. Tr. p. 68)

Respondent's witness testified "Experience is one of the things given less weight (Adm. Tr. p. 155).

Respondent's witness testified, "Well, I don't know that I can say what weight I give to anything." and "We feel that -- that an attorney will learn, perhaps, while they're working for our office." (Adm. Tr. p. 155)

Respondent's attorney asked his witness, "And it is fair to say that it is a training ground?" Respondent's witness, "Yes." (Adm. Tr. p. 119)

Walk-in applicants were not hired as they had experience (Adm. Tr. p. 96).

Respondent's witness ". . . Every attorney starting in our office began in the criminal division, whether they had experience or didn't have experience. . . ." (Adm. Rec. p. 143)

And the job advertisement and the testimony of Respondent's witnesses indicated that anyone hired would start at the bottom and be very limited in any decision or what he was authorized to do. It was a very highly institutionalized and the job notice said it was like a large law office. There were a lot of people doing a lot of different things an dno one person handled a case from beginning to end. There was a trial pool a setting in motion department, some persons making a list of witnesses, other evaluation of a case, some on plea bargaining, and others on the morning calendar call. There were quarterbacks, assistants, and chiefs (Adm. Tr. pp. 109, 110, 118).

Larson, *Employment Discrimination,* Vol. 2, pages 10-148 (1975) comments on a case, 492 F.2d (9th Cir. 1974), that did not have direct discrimination by advertisement on basis of age like the case at bar, but considered the promotion-from-within policy:

> "An example of a post-*McDonnell* case applying the second-stage test is *Gates v. Georgia-Pacific Corporation.*[18] The charge was brought by a black woman with a strong academic background in accounting, including a bachelor's degree in business administration and a Master of Business Administration degree from New York University, and with a history of teaching accounting at the college level as well as of working as accountant for federal and local agencies. She responded to an advertisement for a cost accountant vacancy, and was interviewed but never hired. The Ninth Circuit had no difficulty in finding that she had successfully met her burden of proving a prima facie case. It then

> went on to the second stage, and concluded that the employer had not met its burden of showing a legitimate nondiscriminatory reason for not hiring the plaintiff. The employer's primary justification was the alleged existence of a promotion-from -within policy. This was rejected principally because, under the facts of this case, the policy was in fact discriminatory, because at the entry levels the company took in very few blacks, and hence a promotion-from-within policy merely perpetuated the effects of this discrimination at time of original hiring."

An employer does not have to hire an unqualified person. And an employer has the right to employ the best qualified person, Labor Code 1420.1(b).

However, 30 attorneys were interviewed but there was no evaluation and the applicants were not listed according to their qualification. There were no guidelines and no job analysis and experience was given less weight and the person in charge of hiring did not know what weight to give anything (Adm. Tr. 155).

An employer may always select the better qualified applicant, but the choice cannot be tainted with the impermissible criteria of age. *Wilson v. Sealtest Foods Division of Kraft Co. Corp.,* 501 F.2d 84 (Fifth Cir. 1974).

In *Gillin v. Federal Paper Board Company,* 479 F.2d 97 (Second Cir. 1973), it was decided that where employer used as a factor in determining that employee was not qualified for job as traffic manager the fact that employee was female, the employer was guilty of sex discrimination even though position was filed by a more qualified male employee.

11. Respondent's witness in charge of hiring advised the FEPC consultant, ". . . at his age, and attitude there would be some difficulty working with other deputies." (Adm. Tr. p. 63)

This is obviously a direct violation of the act and establishes a prima facie case of discrimination and violated the freedom of association and other provisions of the constitution, state and federal.

The California Supreme Court had no difficulty in condemning arbitrary discriminatory practices by a private employer against a classification the Legislature refused to include in the statutory prescription of the act, but permits a political subdivision of the state to engage in an infinity of arbitrary employment practices in violation of an age discrimination act as was disclosed by the Supreme Courts conclusion in *Gay Law Student Association v. Pacific Telephone & Telegraph Co.*, 24 Cal.3d 458, 156 Cal.Rptr. 14, 595 P.2d 595, 613 (1979):

"5. *Conclusion*

> If this court were to accede to PT&T's sought sanction for its alleged arbitrary discriminatory practices, we would approve of a rule that would extend beyond the subject of employment discrimination against homosexuals. We would necessarily empower any public utility to engage in an infinity of arbitrary employment practices. To cite only a few examples, the utility could refuse to employ a person because he read books prohibited by the utility, visited countries disapproved by the utility, or simply exhibited irrelevant characteristics of personal appearance or background disliked by the utility. Such possible arbitrary discrimination, casting upon the community the shadow of totalitarianism, becomes crucial when asserted by an institution that exerts the vast powers of a monopoly sanctioned by government itself. We do not believe a public utility can assert such prerogatives in a free society dedicated to the protection of individual rights.
>
> The judgment in favor of PT&T is reversed. The judgment in favor of the FEPC is affirmed."

C.

REPRISAL AND RETALIATION

First Amendment is enforced against the states by the Fourteenth Amendment and provides in part:

> "Congress shall make no law prohibiting . . . the right of people . . . to petition government for redress of grievances."

California has a retaliation act in the Labor Code:

> "1420. It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:
>
> (e) For any employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this act or because he has filed a complaint, testified or assisted in any proceeding under this part."

The person in charge of hiring for Respondent informed the FEPC consultant that he would not hire Petitioner for two additional openings because of the FEPC complaint (Adm. Tr. pp. 74, 77).

The decision, page 14, said Petitioner is in no position to complain of FEPC's or trial court's failure to find when he did not charge such a offense.

The burden of proof considerations set down in *McDonnell-Douglas Corp. v. Green, supra,* apply to retaliation cases. The complainant must establish a prima facie case of retaliation and the employer must come forward with a legitimate nondiscriminatory reason for its conduct. A retaliatory act was disclosed at hearing and Respondent did not give a reason for its act of reprisal and retaliation.

The law provides, "exceptionally broad protection" against reprisal and retaliation and the complainant need not establish the validity of his original claim. *Pettway v. American Iron Pipe Co.,* 411 F.2d 1005 (5th Cir. 1969).

Petitioner did not learn about the retaliation until he heard the testimony of the FEPC consultant at the hearing. In his petition to the trial court one of the reasons he objected to the FEPC decision was the fact that it did not find a violation of the Retaliation Act, Section 1420(e). The trial court made no mention of the 1420(e) violation.

The decision is contra to *Northern Inyo Hospital v. Fair Employment Practices Commission, supra,* although the decision cited the case (Appendix B, p. 9), but only with regard to "independent judgment" test. The *Northern Inyo* case decided that although an accusation did not allege a violation of

1420(e), the hearing disclosed a violation and it reversed the trial court and found a 1420(e) violation.

In *Nash v. Florida Industrial Commission,* 389 U.S. 235 (1967):

> "Congress has made it clear that it wishes all persons with information about such practices [unfair labor practices] to be free from coercion against reporting them to the Board."

The holding in *Stearns v. Fair Employment Commission,* 6 Cal.3d 205 (1971), the accusation had only charged refusal to rent and not discriminatory rental practices. The variance between allegation in a pleading and proof not deemed material, unless it has actually misled.

Parameters are not limited to issues or claims like or related to the allegations in the administrative charges, but may encompass the entire scope of EEOC investigation which could reasonably have been expected to flow from the charges presented to the Commission. *Sanchez v. Standard Brands, Inc.,* 431 F.2d 455 (5th Cir. 1970).

Black female permitted to raise sex discrimination allegations in court action even though only race discrimination alleged in administrative charge. *Vuyanich v. Republic National Bank,* 409 F.Supp. 1083 (N.D. Tex. 1976).

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE GRANTED

The state and federal equal protection clauses clearly prohibit the state or any governmental entity from arbitrarily discriminating against any individual in employment decisions.

The California Supreme Court furnishes reasons why the writ should be granted in *Gay Law Students Association v. Pacific Telephone & Telegraph Co., supra,* 597,

> ". . . Plaintiffs contend that PT&T's aleged discriminatory employment practices violate the equal protection guarantee of the California Constitution by arbitrarily denying qualified homosexuals employment opportunities afforded other individuals. In analyzing this constitutional contention, we begin from the premise that both the state and federal equal protection clauses clearly prohibit *the state or any governmental entity* from arbitrarily discriminating against any class of individuals in employment decisions. (See, e. g., *Purdy & Fitzpatrick v. State of California* (1969) 71 Cal.2d 566, 578, 79 Cal.Rptr. 77, 456 P.2d 645; *Kotch v. Pilot Comm'rs* (1947) 330 U.S. 552, 556, 67 S.Ct. 910, 91 L.Ed. 1093.)"

and on page 599,

> ". . . Protection against the arbitrary foreclosing of employment opportunities lies close to the heart of the protectin against 'second-class citizenship' which the equal protection clause was intended to guarantee. An individual's freedom of opportunity to work and earn a

> living has long been recognized as one of the fundamental and most cherished liberties enjoyed by members of our society (see, e. g., *Truax v. Raich* (1915) 239 U.S. 33, 41, 36 S.Ct. 7, 60 L.Ed. 131; *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 17, 95 Cal.Rptr. 329, 485 P.2d 529) and, as one jurist has aptly noted, 'discrimination in employment isone of the most deplorable forms of discrimination known to our society, for it deals not with just an individual's sharing in the "outer benefits" of being an American citizen, but rather the ability to provide decently for [oneself and] one's family in a job or profession for which he qualifies and chooses.' (*Culpepper v. Reynolds Metal Co.* (5th Cir. 1970) 421 F.2d 888, 891.)"

Further, a writ would be in accord with a long chain of decisions of this court, the only court in many cases protecting the constitutional rights of persons residing in California from discriminatory employment action by the state or its political subdivisions. To cite and quote only one, *Yick Wo v. Hopkins, supra,*

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

CONCLUSION

For the foregoing reasons, it is respectfully requested that a writ of certiorari be issued.

Respectfully submitted,

WALTER F. KERRIGAN

Attorney for Petitioner pro se

APPENDICES

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

OCT 7 1979

I have this day filed Order

SAN FRANCISCO, CA
OCT 6 1979
3 PM

HEARING DENIED

In re: 4 Civ. No. 16614

Kerrigan

vs.

Fair Employment Practice Commission

Respectfully,

G. E. BISHEL
CLERK

John Hancock Patriot
10¢

Walter Kerrigan

2707 Hartford St.

San Diego, CA 92110

IN THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

WALTER F. KERRIGAN,

Petitioner and Appellant,

v.

FAIR EMPLOYMENT PRACTICE COMMISSION,

Defendant and Respondent.

CITY OF SAN DIEGO, CITY ATTORNEY'S OFFICE,

Real Party in Interest and Respondent.

4 Civ. No. 16344

(Super. Ct. No. 381523)

APPEAL from a judgment of the Superior Court of San Diego County. James L. Focht, Judge. Affirmed.

Walter F. Kerrigan, in pro. per., for Petitioner and Appellant.

Evelle J. Younger, Attorney General, Sanford N. Gruskin, Chief Assistant Attorney General, Warren J. Abbott, Assistant Attorney General, and Hadassa K. Gilbert, Deputy Attorney General, for Defendant and Respondent.

John W. Witt, City Attorney, and C. M. Fitzpatrick, Senior Chief Deputy City Attorney, for Real Party in Interest and Respondent.

After practicing law in the Midwest for 20 years, Walter F. Kerrigan moved to California in 1971, passed the attorneys' bar in 1973, and soon thereafter applied for a beginning position in the criminal division of the San Diego City Attorney's office. Of the many applicants interviewed, five young attorneys were hired, but 55-year-old Kerrigan was not. Believing he was rejected as too old for the job, Kerrigan promptly filed a complaint with the California Fair Employment Practices Commission (FEPC) alleging the City Attorney had violated Labor Code section 1420.1, subdivision (a), by denying him employment "solely on the ground of age." The FEPC made an investigation, then filed a formal accusation against the City Attorney, but upon full hearing, denied Kerrigan's claim finding there was no violation of section 1420.1, subdivision (a). Kerrigan next sought a writ of mandate in the superior court to compel the FEPC to set aside its decision. Upon haring and review of the transcript of the administrative hearing and the exhibits, the court denied Kerrigan relief. The court, in its letter opinion, found the evidence sufficient to support the FEPC decision under *both* the substantial evidence and the independent judgment tests. The court however made no written findings of fact. Findings were not required for no request was filed. (Code Civ. Proc., § 632, subd (1).)

On appeal Kerrigan contends the evidence does not support the findings or the decision under *either* test. He maintains the City's own statistics established a prima facie violation of Labor Code section 1420.1, subdivision (a), which the City failed to rebut and that testimony at the hearing disclosed a violation of section 1420, subdivision (e), as well. For the first time on appeal he complains the FEPC violated its own procedural rules by failing to inform him of his right to judicial review.

To say that Kerrigan was qualified for the entry-level position for which he applied is to emphasize the obvious. He holds B.S. and J.D. degrees from the University of Indiana as well as an LL.M. degree, served as a Coast Guard officer during World War II, and for 20 years

practiced law in the Chicago area. During this period he represented savings and loan associations and gained experience both in office practice and in court in the fields of real estate, bankruptcy, securities, domestic relations, and appeals. He also served as an arbitrator in uninsured motorist matters and had quasi-criminal trial experience in connection with building violations. He has been licensed to practice law in Illinois since 1951 and in Indiana since 1942.

In 1971 Kerrigan moved to California and in 1973 passed the attorneys' bar and was admitted to practice here. Unable to find employment in the area of his experience or in the District Attorney's office, Kerrigan finally applied for one of several openings in the City Attornye's office in August 1973.

The employment brochure he was given set out the organization and operation of the office, explained its intern program and said it was traditional to start all incoming attorneys in the criminal division, which prosecutes only misdemeanors. The starting pay was then $1085 per month for attorneys and $713 per month for senior interns awaiting bar results. According to the brochure, "The San Diego City Attorney's office hires and advances prospective and current attorneys without regard to age, sex, race, religion or national origin." One section named the entire legal staff and gave statistics on their ages, marital status, and educational backgrounds. The statistical section began as follows:

"*AGES*:

MEDIANS:

OFFICE	CIVIL DIVISION	CRIMINAL DIVISION
31	32	29

MEANS:

OFFICE	CIVIL DIVISION	CRIMINAL DIVISION
32	35	30"

Not deterred by the brochure, 55-year-old Kerrigan submitted his resume and was interviewed by Deputy City Attorney Shaffran. Kerrigan's background, golf, the weather and the year-round advantages of San Diego were discussed. Shaffran suspected Kerrigan may have come to San Diego to retire and derived the opinion that Kerrigan was not aggressive or dynamic enough to make a good prosecutor; he seemed more interested in other fields of law. Shaffran told Chief Criminal Deputy Swett not to hire Kerrigan.

Swett also interviewed Kerrigan and discussed Kerrigan's previous legal experience and his good health and physical fitness. Swett remarked that years ago they hired a retired Navy officer in Kerrigan's age bracket.

After Swett interviewed at least 30 applicants, 5 ranging in age from 27 to 31 years were hired. Kerrigan was informed of his non-selection by letter from Swett who added:

> ". . . We want you to know, however, that we are very highly impressed with your qualifications.
>
> "We shall keep your resume in our active file and in the event an unforeseen opening on our staff occurs, your name will be among those seriously considered for employment."

Thereafter Kerrigan filed a verified complaint with the FEPC alleging the City Attorney had violated Labor Code section 1420.1, subdivision (a), by denying him employment solely because of his age. The FEPC employee (Aranita) after investigation decided there was probable cause for the charge. Swett had told Aranita that Kerrigan's age and attitude might make working with younger attorneys difficult. Moreover the office's recruiting efforts were directed primarily to accredited law schools and that the only older attorneys hired (with one exception) were retired military men who attended law school after retirement.

Further, during the investigation, two openings in the City Attorney's office developed. Swett told Aranita he would not consider Kerrigan while the FEPC complaint was pending.

The complaint was heard before an administrative law judge and three members of the FEPC. An FEPC attorney represented Kerrigan. Swett testified he did not consider Kerrigan unqualified for the job; he considered his age a "lus," but nevertheless considered him to be less qualified than the persons he hired. The five persons hired had been working in the office as interns. Swett testified Kerrigan's age played absolutely no part in his decision not to hire him. He explained the statistics were included in the brochure to give interested persons from out-of-town a picture of the people they would be wroking (*sic*) with. Deputy Shaffran was 46 years old when hired fresh from law school. Shaffran told Swett not to hire Kerrigan because of his personality.

The opinion adopted by the FEPC included, inter alia, the following findings: It was not established by a preponderance of the evidence that Kerrigan was denied employment solely because of his age or that the City Attorney violated Labor Code section 1420.1, subdivision (a).

The trial court reviewed the administrative record and agreed with the FEPC, finding that FEPC's decision was supported by the weight of the evidence as well as by substantial evidence.

DISCUSSION

In 1972 the Legislature amended the Fair Employment Practice Act (Lab. Code, § 1410 et seq.) to add section 1420.1 providing in pertinent part:

> "(a) It is an unlawful employment practice for an employer to refuse to hire or employ, . . . *any individual between the ages of 40 and 64 solely on the ground of age*, except in cases where the law compels or provides for such action. This section shall not be construed to make unlawful the rejection . . . where

> the individual applicant or employee failed to meet bona fide requirements for the job or position sought or held, . . .
>
> "(b) This section shall not limit the right of an employer, employment agency, or labor union to select or refer the better qualified person from among all applicants for a job. The burden of proving a violation of this section shall be upon the person or persons claiming that the violation occurred."

The new statute took its place beside section 1420 which delcared it unlawful employment practice for an employer to discriminate against any person because of his race, religious creed, color, national origin, ancestry, or sex.[1]/ Section 1412 declared the opportunity to seek, obtain and hold employment without discrimination on the grounds specified in section 1420 to be a civil right, and section 1411 declared the protection of such opportunity to be a matter of public policy. These sections 1411 and 1412 have not been amended to add age discrimination.

Code of Civil Procedure section 1094.5 authorizes the administrative mandamus procedure to obtain judicial review of final adjudication decisions of the FEPC. Where, as here, it is claimed that findings are not supported by the evidence, the statute contemplates that the court will apply either the independent judgment test or the substantial evidence test depending upon the nature of the right in issue. In *Strumsky v. San Diego County Employees Retirement Assn.*, 11 Cal.3d 28, 44-45, the Supreme Court held:

FOOTNOTE 1: Comparable federal legislation is found in 29 United States Code section 621 et seq. (age discrimination) and title VII of the 1964 Civil Rights Act (42 U.S.C., § 2000e et seq.) (discrimination based on race, color, sex, religion or national origin). (See gen. 5 Witkin, Summary of Cal. Law (8th ed. 1973) Constitutional Law, §§ 420-422 and 526-433, pp. 3717-3720 and 3723-3731.)

> "[I]f the order or decision of the agency substantially affects a fundamental vested right, the court, in determining under section 1094.5 of the Code of Civil Procedure whether there has been an abuse of discretion because of the findings are not supported by the evidence, must exercise its independent judgment on the evidence and find an abuse of discretion if the findings are not supported by the weight of the evidence. If, on the other hand, the order or decision does not substantially affect a fundamental vested right, the trial court's inquiry will be limited to a determination of whether or not the findings are supported by substantial evidence in light of the whole record."

Kerrigan's right here is to equal employment opportunity regardless of age. He does not claim a fundamental vested right to be hired for a particular job, but only that he be treated fairly when being considered for a government position. In the specifics of his case, Kerrigan asks that his application not be summarily dismissed or he be otherwise discriminated against because he is 55 years old.

The Attorney General suggests the substantial evidence test; the courts should defer to the adjudications of the FEPC regardless of which party has prevailed in view of that agency's expertise in investigating and resolving charges of unfair employment practices. In *Bixby v. Pierno*, 4 Cal.3d 130, 146, the court used similar reasoning in connection with the issuance of licenses. The City, on the other hand, concedes Kerrigan's right to employment was fundamental but contends such right was not vested since he was only a job *applicant*.

Whether an administrative decision substantially affects a fundamental, vested right so as to require independent judgment review must be decided on a case-by-case basis. In *Bixby, supra*, at page 144, the court offered this guidance:

> "[T]he courts in this case-by-case analysis consider the nature of the right of the individual: whether it is a fundamental and basic one, which will suffer substantial interference by the action of the administrative agency, and, if it is such a fundamental right, whether it is possessed by, and vested in, the individual or merely sought by him. In the latter case, since the administrative agency must engage in the delicate task of determining whether the individual qualifies for the sought right, the courts have deferred to the administrative expertise of the agency. If, however, the right has been acquired by the individual, and if the right is fundamental, the courts have held the loss of it is sufficiently vital to the individual to compel a full and independent review. The abrogation of the right is too important to the individual to relegate it to exclusive administrative extinction."

No case has been found precisely in point; however, in *Northern Inyo Hosp. v. Fair Emp. Practice Com.*, 38 Cal.App.3d 14, an employer claimed a "fundamental vested right to establish its own employment practices," petitioned under Code of Civil Procedure section 1094.5 to set aside an adverse FEPC order. The trial court exercised its independent judgment on the sufficiency of the evidence. The appeal court held this error. The employer had no vested right to conduct its business free of reasonable governmental regulations. However, by way of dicta the court said its decision would not preclude use of the independent judgment in the review of an FEPC decision *unfavorable* to an employee. (*Id.* at p. 23, fn. 9.)

In *Kilpatrick's Bakeries, Inc. v. Unemployment Ins. Appeals Bd.*, 77 Cal.App.3d 539, the court rejected the dichotomous approach taken in *Northern Inyo Hosp., supra,* and held the independent judgment test must be applied to appeals by both employees and employers in unemployment compensation cases since their interests are virtually identical. This meager authority forces us back to basics for answers.

The term "fundamental right" has not been precisely defined. The *Bixby* language is the Supreme Court's latest cannon shot:

> "In determining whether the right is fundamental the courts do not alone weigh the economic aspect of it, but the effect of it in human terms and the importance of it to the individual in the life situation." (*Bixby v. Pierno, supra,* 4 Cal.3d 130, 144.)

Equal employment opportunity is an obvious candidate to match this description.

In decreeing a strict judicial scrutiny in the analogous area of sex discrimination in employment, the California Supreme Court in *Sail'er Inn, Inc. v. Kirby,* 5 Cal.3d 1, 17, discussed the fundamental aspects of employment and equal employment opportunity:

> "The right to work and teh concomitant opportunity to achieve economic security and stability are essential to the pursuit of life, liberty and happiness. As early as 1915, the United States Supreme Court declared tht 'the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of [the Fourteenth] Amendment to secure.' [Citation.] The California Legislature accords statutory recognition to the right to work by declaring the opportunity to seek, obtain and hold employment without discrimination a civil right. [Citation.] Limitations on this right may be sustained only after the most careful scrutiny. [Citations.]"

Gainful employment is central to the individual's role as a productive member of society, to his ability and to provide for his family and himself, and to his psychological need for self-esteem and respect. The ability to seek employment free of discriminatory bars is a necessary corollary. Thus the Legislature has declared it the public policy of California to stamp out age discrimination in employment.

> "It is the public policy of the State of California that manpower should be used to its fullest extent. This statement of policy compels the further conclusion that human beings seeking employment, or retention thereof, should be judged fairly and without resort to rigid and unsound rules that operate to disqualify significant portions of the population from gainful and useful employment. Accordingly, use by employers, employment agencies, and labor organizations of arbitrary and unreasonable rules which bar or terminate employment on the ground of age offend the public policy of this State." (Unemp. Ins. Code, § 2070.)

Further, the Legislature has outlawed age discrimination in hiring practices. (Lab. Code, § 1420.1.)

We conclude equal employment opportunity is fundamental to the individual in economic and human terms and in the totality of the life situation. Thus, equal employment opportunity qualifies as a fundamental right for the purposes of fuller judicial review of administrative agency decisions.

Independent judgment review is not proper unless equal employment opportunity is also a "vested right." The *Bixby* court defined "vested right" by way of contrast: "and, if it is such a fundamental right, whether it is possessed by, and vested in, the individual or merely sought by him" (*Bixby v. Pierno, supra,* 4 Cal.3d 130, 144.) "Vested" most often refers to property rights, e.g., unemployment compensation (*Thomas v. California Emp. Stab. Com.,* 39 Cal.2d 501), continuation of welfare benefits (*Harlow v. Carleson,* 16 Cal.3d 731). But the meaning of vested, "possessed by," need not be limited to describing tangible wealth; constitutional and statutory rights can also be "possessed" by a person: to that extent, they are vested. Kerrigan's statutorily-conferred right to be free of age discrimination in seeking employment in this sense is a vested right. (See *Perea v. Fales,* 39 Cal.App.3d 939.)

Similarly, where the action of an administrative agency infringes constitutionally-granted rights, independent judicial review must be invoked. In *Adcock v. Board of Education,* 10 Cal.3d 60, the Supreme Court imposed review by independent judgment where a teacher claimed that his transfer to another school was a penalty given him for exercising first amendment rights. The court stated:

> "[I]t has been essential to adopt a special rule or standard to review administrative decisions when constitutional rights are assertedly limited [citations]. . . ." (*Id.* at pp. 65-66.)

While the court did not use the "fundamental vested right" language, the essential concept is the same.[2]/ The courts have a duty to protect constitutional or fundamental rights from infringement by administrative agencies. The courts, not the administrative agency, have the valuable expertise, the broad background and constitutional foundation necessary to perceive and defend constitutional and fundamental rights from a balanced perspective. A line, carefully drawn between the subjects over which the agency has important expertise and the areas of quasi-judicial decision-making over which the courts have superior knowledge and background, point to the independent judgment standard where constitutional rights are circumscribed.

We conclude the independent judgment test was the appropriate standard to be applied by the trial court to Kerrigan's challenge to the FEPC determination. In an abundance of caution the trial court here applied both tests and found te FEPC decision supported by both substantial evidence and the weight of the evidence. A similar approach was taken by the trial court in *Strumsky, supra.* There the

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FOOTNOTE 2: *Adcock* was decided before *Strumsky*; independent judgment did not then apply to the decision of a local agency affecting a fundamental vested right but would apply after *Strumsky*.

trial court, again out of an abundance of caution found the administrative decision supported by substantial evidence but indicated it would reverse the decicision (*sic*) on an independent judgment review. The Supreme Court in the interest of judicial economy found the trial court's independent judgment was supported by substantial evidence and affirmed. (*Id.* at p. 46.)

Our task, similarly, is to determine whether there is substantial evidence to support the trial court's judgment. (*Bixby v. Pierno, supra,* 4 Cal.3d 130, 143, fn. 10; *Moran v. Board of Medical Examiners,* 32 Cal.2d 301, 308; *Mountain Defense League v. Board of Supervisors,* 65 Cal.App.3d 723, 728.)

Resolving all conflicts in the evidence in favor of the judgment in this case and drawing all legitimate and reasonable supporting inferences as we must, we conclude the judgment must be affirmed.

Labor Code section 1420.1, subdivision (b), placed the ultimate burden of proof, the burden of persuasion, squarely on Kerrigan.

The evidence before the FEPC and the trial court, albeit disputed, in the inferences to be drawn, is substantial in nature and supports the trial court's determination that Kerrigan was not discriminated against on account of age. Kerrigan simply failed to meet, to carry his burden of proof.

Kerrigan's claims of procedural error are also without merit. He is in no position to complain of the FEPC's or the trial court's failure to find a violation of Labor Code section 1420, subdivision (e), when he did not charge such an offense. The FEPC's failure to include in its order written notice of the right to judicial review obviously did not prejudice Kerrigan. The trial cuort was not required to make written

findings in absence of a request. (Code Civ. Proc., § 632; *Friends of Lake Arrowhead v. Board of Supervisors,* 38 Cal.App.3d 497, 518, fn. 17.)

Judgment affirmed.

CERTIFIED FOR PUBLICATION.

Stanford
J.

WE CONCUR:

Acting P.J.

J.